89-568

No.

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL

PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,

RESPONDENTS

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Stanley Smolarek responds to the petition of Chrysler Corporation, Louis Eovaldi, and Lyndon Verlyndon for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

1.) Smolarek's Claim

On April 1, 1986, Smolarek filed a two count Complaint arising under state law against Chrysler in Michigan's Wayne County Circuit Court alleging discrimination under Michigan's Handicappers Civil Rights Act, plus workers' compensation retaliation. (App. A, infra, 1a-5a). Smolarek had become employed with Chrysler in 1953, and remained in Chrysler's employ until his lay off in October 1984. (App. B, infra, 6a) In 1955, Smolarek suffered a work-related injury which left him with a seizure disorder controlled by medication. From 1955 to 1984, he worked for Chrysler at a job that was compatible with medical restrictions stemming from the injury. (App. B, infra, 6a).

Smolarek did, however, suffer a seizure at work on October 8, 1984. He took 2 weeks off without any change in his job status, e.g. placement on medical leave of absence, and then Chrysler's medical department cleared Smolarek to return to work with the same restrictions he had worked with since 1955. (App. B,

infra, 6a-7a). Smolarek then reported to his foreman for placement, but was informed that no work was available within his restrictions, even though Smolarek had reason to believe that his job was still available. (App. B, infra, 7a).

A second attempt by Smolarek to return to work in 1985 produced similar results. This time, Chrysler's foreman indicated his reason for refusing to return plaintiff to his former position: "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack." (App. B, infra, 7a).

In his Complaint, Smolarek alleged that Chrysler, in refusing to return Smolarek to his position, violated its duty under the Handicappers' Civil Rights Act to refrain from discriminating against an employee because of a handicap that is unrelated to the employee's ability to do his job.[1] (App. A, infra,

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[1] Smolarek also alleged that Chrysler had violated the MHCRA by refusing to accommodate Smolarek by returning him to other work compatible with his restrictions. (In other words,

2a-3a)

Smolarek also alleged that Chrysler refused to return him to work because Chrysler feared unduly that Smolarek

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work other than his former position). Subsequent to the filing of the Complaint, the Michigan Court of Appeals held that the accommodation provisions of the MHCRA, MCL 37.1102(2); MSA 3.550(102)(2), did not extend to placement in a new job. Rancour v Detroit Edison, 150 Mich App, 276 (1986). Given this interpretation of the accommodation section, Smolarek could not have prevailed in state court on his Complaint to the extent that he sought accommodation to another position. For this reason, Smolarek indicated at oral argument in the Court below that, in the event of a ruling of no preemption, Smolarek's claim in state court would be limited to reinstatement to his former position (plus damages), and not a claim for reinstatement to another position compatible with his restrictions.

In this connection, Smolarek has no quarrel with the general proposition that issues of removal and preemption are determined with reference to the plaintiff's Complaint. But where there has been a change in the law subsequent to the filing of a complaint which would preclude a portion of a cause of action affecting the removal/preemption analysis, the plaintiff should be permitted to abandon or disclaim that portion of his Complaint for purposes of such analysis, so long as the plaintiff is bound by the abandonment or disclaimer upon eventual remand to the trial court.

might re-injure himself and make a workers' disability compensation claim under Michigan's Workers' Disability Compensation Act. (App. A, infra, 3a) This claim has since been abandoned.[2]

In short, the essence of Smolarek's claim is that Chrysler refused Smolarek an opportunity to return to his former job because of unfounded perceptions that Chrysler had concerning: 1) the ability of handicapped employees to work; and 2) the hazards they supposedly present to themselves or others.

The fact that Smolarek is a union member and that certain terms and conditions of his employment are governed by a collective bargaining agreement is

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[2] In fact, with respect to the workers' compensation retaliation claim that Smolarek abandoned, it is clear that the Sixth Circuit accepted this abandonment in its removal/ preemption analysis. Interestingly, though Chrysler argues at page 19 of its Petition that Smolarek's disclaimer of a portion of his handicap claim is void for purposes of the removal/preemption analysis, Chrysler makes no such complaint about Smolarek's abandonment of the workers' compensation retaliation claim, undoubtedly because, under Lingle v Norge Div. of Magic Chef, 486 U.S.--, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), it would do Chrysler no good.

purely incidental to this case. Smolarek asserts no rights under the collective bargaining agreement. Section 53 of the collective bargaining agreement, which pertains to reinstatement following disability leave, cannot and does not apply where, as here, the employee is not placed on disability leave and both the employee and the company doctor are in complete agreement over the medical restrictions to be imposed.

Why then has Chrysler asserted this section of the CBA as the basis for its pre-emption argument? The answer is simple: Chrysler seeks to exempt itself from state employment legislation that it disfavors. There is a real risk that the CBA might be misused to impair unnecessarily an employee's state court remedies. As a consequence, the CBA becomes what is feared most: a pretext to disqualify, screen out, and eliminate those employees who, by virtue of their handicap status, are entitled to protected status.

It must be remembered that this case does not involve an issue of whether Smolarek's handicap is job related. There is no allegation by Chrysler that

in the exceedingly short time between Smolarek's seizure and his clearance to return to work the job duties or working conditions changed. There is no evidence that Smolarek could not return to the same job he performed previously or that Chrysler had exercised its prerogatives under the CBA to change its mode of operation or redefine Smolarek's job. If that were the case there would be room for Chrysler's argument that Section 53 would come into play to resolve a dispute as to whether Smolarek could actually perform the job in question given his medical restrictions. By artificially creating a dispute where none exists, Chrysler places itself in position to claim that the dispute resolution mechanism in Section 53 must govern to the exclusion of Smolarek's state court remedies. The absence of any such dispute proves the point being made here: the CBA is being used as an artifice to circumvent Smolarek's legislatively mandated parallel state remedies.

Perhaps the best evidence that Smolarek's state law claim presents no threat to the collective bargaining process is the fact that the Inter-

national Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) has stood shoulder-to-shoulder with Smolarek as an Amicus Curiae throughout the appellate process in opposition to the arguments of Chrysler.

2. The Sixth Circuit Decision

The dissent written by Judge Kennedy was a partial dissent and applied only to that portion of Respondents' Complaints that sought reinstatement to a position other than the ones they had held. In fact, the Sixth Circuit was unanimous in its conclusion that removal of Smolarek's claim was improper to the extent that Smolarek was seeking reinstatement to his original position. Given the fact that Smolarek abandons that portion of his MHCRA Complaint that seeks reinstatement to a position other than the one he held, the concern of Judge Kennedy and her fellow partial dissenters is alleviated.

REASONS FOR DENYING THE PETITION

1. THE SIXTH CIRCUIT EN BANC OPINION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. Smolarek's State Law Claim of Handicap Discrimination, As Well As The Defense To That Claim, Is Not Dependent On, Nor Does It Require Analysis Of The CBA.

1. Lingle v Norge Division of Magic Chef Looks To The Nature Of The Inquiry Necessary To Resolve The State Claim In Considering Whether Preemption Applies.

In Lingle v Norge Division of Magic Chef, 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), a union employee sued her employer, alleging she was discharged in retaliation for filing a worker's compensation claim, a cause of action cognizable under state law. The applicable CBA provided her a contractual remedy for discharge without just cause. In a separate proceeding, plaintiff also took advantage of the CBA grievance procedure, and won reinstatement with back pay at arbitration. While the grievance procedure was pending, Lingle filed her state court action.

In a unanimous opinion holding that

the state claim was *not preempted by* §301, this Court noted that the issues raised by the state law claim did not require interpretation of the CBA:

> "[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights. Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for §301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement."

[citations and footnote omitted]

The fact that the unionized employee in Lingle used the CBA grievance procedure to resolve her dispute with the employer and at the same time was permitted by this Court to proceed to enforce her rights under state law is highly significant. It is clear that the possibility of inconsistent results, alone, is not enough to invoke pre-emption as a bar to this independent and parallel remedy.

This Court in Lingle went on to conclude that, even where a discharge may be lawful pursuant to a CBA but unlawful under a state anti-discrimination law, federal pre-emption does not apply so long as the state claim can be resolved without interpretation of the CBA. Lingle, 108 S.Ct. at 1885.

Below, we demonstrate unequivocally that Smolarek's state law claim for handicap discrimination involves purely factual questions regarding the conduct and motivation of Chrysler without any need for the interpretation of any CBA provisions.

2. Close Examination Of The Issues Necessary To Resolve Plaintiff's Discrimination Claim Makes It Clear That Interpretation Of The CBA Is Not Involved.

As this Court stated in Texas Department of Community Affairs v Burdine, 450 U.S. 248, 101 S. Ct. 1089 67 L.Ed. 207, (1981), the McDonnell-Douglass presumption-based proof scheme operates as follows:

1. Proof of a prima facie case by plaintiff.

2. Articulation by defendant of a legitimate non-discriminatory reason for the employment decision.

3. Proof by plaintiff that the articulated reason is not the true reason, but a pretext for discrimination. Burdine, 450 U.S. at 252-253.

The prima facie case of disparate treatment consists of evidence that the employee was qualified for an available position and was rejected under circumstances which give rise to an inference of discrimination. Here, Smolarek was ready and able to return to work at his regular job and was therefore qualified for that job at the time that the employment decision to deny him work

was made.[3]

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[3] Incidentally, the claim of Petitioner that Smolarek alleged in his Complaint that he was on a "disability leave" for two weeks (Petitioner's Brief at p.4) is misleading. Smolarek alleged that he was disabled for two weeks, but this is not to imply that he received formal recognition of a "disability leave" status pursuant to the CBA. Indeed, because Chrysler chose to include only a portion of the CBA in its contributions to the Joint Appendix in the Court below, portions which do not include any definition of what constitutes a disability leave, on this record there is simply no evidence that Smolarek's two week absence is a "disability leave" within the meaning of §53 of the CBA, or whether it was merely treated as any short term illness without formal recognition of a disability status. But even if we assume, arguendo, that Smolarek's two weeks off brings into play §53 of the CBA, an employer not motivated by discrimination would be expected to have taken Smolarek back to work at that time, because Smolarek had passed the required medical examination. But Smolarek was simply told that no jobs were available, a position that Smolarek had good reason to believe was false, i.e. a pretext.

Further, the fact that Smolarek was ready and able to return to work at his regular job at the time the employment decision at issue here was made renders inapposite Carr v General Motors, 425 Mich 313, 389 N.W.2d. 686 (1986), because, in that case, the challenged employment decision was made at a time when the employee's medical condition was

Chrysler's defense to the handicap discrimination claim will undoubtedly focus on its motivation: Chrysler will claim that it made the disputed employment decision on account of a provision in the CBA. Analysis of the CBA provision itself will not be necessary. Proof that such analysis is unnecessary is found in Burdine, supra:

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the profferred reasons". [emphasis added]. Burdine, supra at 254.

In other words, Chrysler's mere articulation of the CBA as its motivation, without analysis of its terms, is sufficient to rebut the presumption of discrimination.

It will then be incumbent on Smolarek to demonstrate that the articulated reason for the employment

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affecting his ability to do his regular job.

decision is a pretext, either directly by persuading the Court that discrimination was more likely the motivation, or indirectly by showing that the employer's stated reason is not worthy of belief. Burdine, supra, at 256. This may be accomplished, for example, by evidence that the person making the decision had something other than the CBA in mind, such as an expressed, unfounded fear of the handicapped. (e.g. "What if you have a seizure, Stan? Others could see you and have a heart attack"). Clearly, Smolarek's pretext claim will not be advanced by quibbling with Chrysler over interpretation of the CBA. It is for this reason that Smolarek will accept any good faith interpretation by Chrysler of the CBA, simply because any argument by Smolarek with Chrysler over CBA interpretation merely emphasizes to the trier of fact Chrysler's position that the CBA, and not discrimination, was at the root of its motivation.

Therefore, Smolarek's focus will be to demonstrate pretext, by showing that the CBA was not involved in the decision. Obviously, under such circumstances, Smolarek's claim is not dependent on the

terms of the CBA. To the contrary, Smolarek's handicap claim meets the parallelism principle established in Lingle, so central to the outcome of this case that it bears repeating here:

> "In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."

In short, this case no more requires analysis of the terms of the CBA than a discrimination case against an employer-at-will would require an analysis of whether the employer was truly an at-will employer.

B. The Sixth Circuit Correctly Applied The Test For Pre-Emption Established By This Court.

The Court below recognized the distinction that is crucial to proper resolution of this case when it held in the companion Fleming case:

> "We recognize that Chrysler is likely to assert as its defense

> to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Smolarek [sic] because of his handicap or solely because Chrysler felt bound by the union agreement to take the actions. It is not necessary to decide whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation?"

2. THERE IS NO CONFLICT IN THE CIRCUITS ON THIS ISSUE

A. The Ninth Circuit Has Decided Two State Handicap Discrimination Claim Cases Consistently With The Sixth Circuit In The Case At Bar.

In Miller v AT&T Network Systems, 850 F.2d 543 (9th Cir. 1988), the Ninth Circuit Court of Appeals, in a very well-reasoned opinion, recently outlined a three-pronged test pursuant to the rule

enunciated by this Court in Allis Chalmers Corp. v Lueck, 471 U.S. 202 (1985) to determine whether a state law claim is sufficiently "independent" of a CBA to withstand §301 pre-emption:

> "In deciding whether a state law is preempted under §301, thereore, a court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract. A state law will be preempted only if the answer to the first question is 'yes,' and the answer to either the second or third is 'no.' [footnote omitted]

The Court in Miller had before it the Oregon Handicap Discrimination Law, Oregon Revised Statutes §659.121, 659.405, and 659.425. The plaintiff in the case was unable to work in high temperatures because of an effect on his heart. Though normally assigned to cool climates, he received a 13 week

assignment in Arizona in the summer, and lost consciousness on the job there one day. He refused to return to work in Arizona and was fired, though willing to return to the cooler climate. The CBA governed assignments, transfers, and discharges, so the first prong for preemption under the above test was met.

However, the State of Oregon made it unlawful to fire an employee because of a physical handicap if, with reasonable accommodation, the individual could perform the work. Taking this into account, and examining the Oregon Supreme Court's construction of its handicap discrimination law, the Ninth Circuit noted that the State of Oregon construes its discrimination statute "so that it relies on standards of discriminatory firings that are independent of any standards of reasonable treatment set forth in the CBA":

> "This state tort does not require a comparison of the discharge provisions of the CBA with the requirements of the statute. It requires only a showing that there is no probability that Miller cannot do the job satisfactorily or that he can do so only at the risk of incapacitating himself. We therefore conclude that

> Oregon's antidiscrimination statute articulates an independent standard that is not inextricably intertwined with the interpretation of terms in the CBA.

Further, the Ninth Circuit concluded that the right to be free of handicap discrimination in Oregon was non-negotiable because of the legislature's expressed policy that:

> "employment without discrimination because of handicap ... [is] declared to be the right of all people in this state."

Similarly, Michigan's HCRA articulates a standard of discrimination that is independent of standards of reasonable treatment found in a CBA. Pertinent portions of the Michigan statute make it clear that any employer having four or more employees, and whose employee is not the parent, spouse, or child of the employer, shall not discharge or otherwise discriminate against an employee with respect to the terms, conditions, or privileges of employment because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. MCL §37.1201 (b) and 1202; MSA

3.550(201)(b) and (202).

In Carr v General Motors Corp., 425 Mich 313; 389 N.W. 2d 686, (1986), the Michigan Supreme Court interpreted the handicap statute as follows:

> "The Legislature has spoken clearly and has mandated, not just once, but many times throughout the HCRA, that the only handicaps covered by the act, for purposes of employment, are those unrelated to ability to perform the duties of the position."

Obviously, the standard by which to measure handicap discrimination in Michigan, as established by statute and interpreted by the Michigan Supreme Court, is remarkably similar to the statutory standard of the Oregon law that was considered in Miller and was held not preempted. Hence, the State of Michigan has articulated a standard sufficiently clear that plaintiff's handicap discrimination claim can be evaluated without considering any overlapping provisions of the CBA.

Considering the third prong of the test in Miller, Michigan has clearly intended that the right to be free of handicap discrimination shall be non-negotiable. For example, the preamble to

the Handicappers' Civil Rights Act states:

> "An act to define the civil rights of individuals who have handicaps; to prohibit discriminatory practices, policies, and customs in the exercise of those rights; and to provide for the promulgation of rules."

No exemption from the statute is granted to unionized employers:

> "Employer" means a person who has 4 or more employees or a person who as contractor or subcontractor is furnishing material or performing work for the state or a governmental entity of agency of the state and includes an agent of such a person."

Further, the Michigan Supreme Court, in Carr, supra, cited the comments of a state senator made at the time of passage of the Act, and while speaking on the Senate floor, regarding the intent of the Act:

> "The bill essentially spells out the above areas of civil rights, now guaranteed to all, and applies them with equal force under the law to this new category. Handicapped persons wish to, and, when the legislation is enacted into law, must be judged and accepted based on their

ability." [emphasis added]

Hence, Michigan, like Oregon in the Miller case, has clearly shown an intent not to allow its prohibition against handicap discrimination to be altered or removed by private contract.

Thus, under the test enunciated by the Ninth Circuit in Miller, the Michigan Handicappers' Civil Rights Act clearly should not be preempted.

In Ackerman v Western Electric Co, 860 F.2d. 1514 (9th Cir. 1988), the 9th Circuit ruled that an employee's California state law handicap discrimination claim was not preempted by § 301. Reasoning that Lingle, supra, was controlling, and following its decision in Miller, supra, the Court stated that the employee's state law right is defined and enforced without reference to the terms of a collective bargaining agreement. Hence, the Ninth Circuit again applied the test set forth by this Court and decided the case consistently

with the Sixth Circuit in the case at bar.

B. The Circuit Court Decisions Alleged By Petitioner To Be In Conflict With The Sixth Circuit In The Case At Bar Are In Fact Distinguishable.

Douglas v American Information Technologies Corp, 877 F.2d. 565 (7th Cir. 1989), alleged by petitioner to be in conflict with the Sixth Circuit here, is readily distinguishable. There, the plaintiff filed a complaint for intentional infliction of emotional distress stemming from management's alleged retaliation for her refusal to perform stressful or overtime work on account of her medical condition. The retaliation alleged included, inter alia, arbitrary denial of excused work days, the giving of an unjustified final warning, the subjecting of the plaintiff to the "ordeal" of filing grievances, the threat of firing if the plaintiff took any time off, and the subjecting of the plaintiff to excess scrutiny of her work.

The Seventh Circuit examined first the elements of a state cause of action for intentional infliction of emotional distress: 1) extreme and outrageous

conduct; 2) intent or knowledge that the conduct will inflict severe emotional distress. Given the nature of the retaliation alleged, the Seventh Circuit concluded that interpretation of the terms of the CBA would be necessary in order to determine whether the conduct was authorized by the CBA:

> "Because Ms. Douglas' intentional infliction of emotional distress claim, consists of allegedly wrongful acts directly related to the terms and conditions of her employment, resolution of her claim will be substantially dependent on an analysis of the terms of the collective bargaining agreement under which she is employed. A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement. Therefore, we hold that Ms. Douglas' state-law claim is preempted and must be pursued as a section 301 claim." [footnote omitted] Douglas, supra, at 573.

The Seventh Circuit decided the case as it did because a crucial measure of whether the employer's conduct was outrageous turned on whether or not the conduct was authorized by the CBA. If it was, then the employer would have done no

more than insist on its legal rights in a permissible way, Douglas, supra, at 571, which is a valid defense to a claim for intentional infliction of emotional distress.

Here, and this is the crux, in contrast, it is not necessary to decide whether the CBA provisions Chrysler points to truly apply to Smolarek's situation. It is only necessary to decide whether Chrysler had the CBA in mind when it denied Smolarek a chance to return to work.

Significantly, the Seventh Circuit itself, in Douglas, supra, applied Lingle, supra, and distinguished Miller, supra. Hence, it saw no conflict with the Ninth Circuit in its application of Lingle.

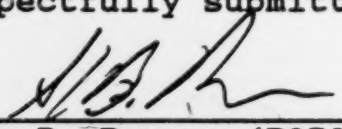
Similarly, Johnson v Anheiser Busch, Inc, 876 F.2d. 620 (8th Cir. 1989), also claimed by Chrysler to be in conflict with the Sixth Circuit here, is easily distinguished. There, state law claims for slander, intentional infliction of emotional distress, tortious interference with contract, and wrongful discharge were held preempted. The case arose following the plaintiff's dis-

charge after he was accused of slashing tires in a company parking lot. As in Douglas, supra, these claims were pre-empted because their resolution would depend on interpretation of the CBA: the fact finder simply could not decide the case without determining the extent to which the conduct of the employer was authorized by the terms of the CBA. Again, that is a far cry from this case, where it is only necessary to decide whether or not Chrysler had the CBA in mind as its motivation for refusing to return Smolarek to work.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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November 1989

APPENDICES

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STANLEY SMOLAREK,

Plaintiff,

86-606822 CZ 04-01-86 SIMMO
SMOLAREK V CHRYSLER CORP

-vs-

CHRYSLER CORPORATION,

Defendant.
_____/

JURY DEMAND

JURY FEE PAID
THIS DATE:
APR 01 1986

COMPLAINT AND JURY DEMAND

Plaintiff complains that:

Count I. - Handicap Discrimination

1. Plaintiff at all times pertinent has been a resident and citizen of the State of Michigan.

2. Defendant at all times has been a corporation having its principal place of business in Wayne County and is therefore a citizen of the State of Michigan.

3. The amount in controversy, exclusive of interest, costs, and attorney fees, is in excess of Ten Thousand Dollars ($10,000.00).

4. Defendant at all times pertinent has been an employer within the meaning of Michigan's Handicappers' Civil Rights Act.

5. Plaintiff has been an employee of defendant since 1953.

6. In 1955, plaintiff suffered an injury while in the course of his employment at Chrysler.

7. Complications following that injury necessitated brain surgery.

8. Since that injury in 1955, plaintiff has had a medical condition that leaves him subject to occasional seizures which are largely controlled with medication.

9. Plaintiff was actively employed at Defendant's

Jefferson Assembly Plant for more than ten years up to approximately October 8, 1984.

10. At all times, plaintiff performed his job duties competently and satisfactorily.

11. At all times, plaintiff's medical condition has been unrelated or substantially unrelated to his ability to perform the duties of his job.

12. On or about October 8, 1984, plaintiff suffered a seizure while at work.

13. Plaintiff was disabled following that incident for aproximately two weeks.

14. Thereafter, plaintiff reported to work to his former position.

15. At all times pertinent, it has been the duty of defendant to its employees in general and to plaintiff in particular under Michigan's Handicappers' Civil Rights Act to:

> a) refrain from discriminating against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> b) refrain from limiting, segregating, or classifying an employee in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely effect the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> c) refrain from taking discriminatory action against an individual on the basis of physical examinations that are not directly related to the requirements of the specific jobs;
>
> d) accommodate plaintiff's handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate plaintiff so that he can remain in the active employ of defendant.

16. Notwithstanding those duties and in direct violation thereof, defendant has refused to return plaintiff to his former position or another position consistent with his medical

restrictions and has maintained plaintiff instead on a disability lay off indefinitely.

17. As a direct and proximate result of the above violation by defendant, plaintiff has lost and will continue to lose wages, seniority, and other fringe benefits of employment and has and will continue to suffer nondisabling mental and emotional anguish and distress, embarrassment, humiliation, loss of self-esteem, and sense of outrage and indignity.

WHEREFORE, Plaintiff demands the following relief:

a) reinstatement to his former position upon conditions free from discrimination;

b) compensatory and exemplary damages for whatever amount in excess of Ten Thousand Dollars ($10,000.00) plaintiff is found to be entitled;

c) interest, costs, and attorney fees;

d) such other relief that this Court deemsjust and equitable in the circumstances.

Count II.
Workers' Disability Compensation Retaliation

1. Plaintiff incorporates Count I.

2. At the time that plaintiff reported for work following the October 1984 seizure, defendant refused to return plaintiff to work because defendant feared unduly that plaintiff might injure or re-injure himself at work arising out of and in the course of his employment, thereby rendering defendant liable for workers' disability compensation benefits.

3. At all times, it has been the duty of defendant to refrain from discriminating or otherwise retaliating against its employees in general and plaintiff in particular in anticipation of such employee making a claim against defendant under the Workers' Disability Compenstion Act.

4. Notwithstanding that duty and in direct violation thereof, defendant has refused to return plaintiff to work.

5. As a direct and proximate result of this action by defendant, plaintiff has suffered all of the injuries and damages as alleged in Count I.

WHEREFORE, Plaintiff demands judgment against defendant as requested in Count I.

KELMAN, LORIA, DOWNING
SCHNEIDER & SIMPSON

By _____

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DATED: April 1, 1986

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STANLEY SMOLAREK,

Plaintiff,

86-603822 CZ 04-01-86 SIMMO
SMOLAREK V CHRYSLER CORP

-vs-

JURY DEMAND

CHRYSLER CORPORATION,

Defendant.
_____/

DEMAND FOR TRIAL BY JURY

NOW COMES Plaintiff, STANLEY SMOLAREK, by and through his attorneys, KELMAN, LORIA, DOWNING, SCHNEIDER & SIMPSON, and hereby makes a formal demand for a trial by jury on all of the issues in the above cause of action.

KELMAN, LORIA, DOWNING
SCHNEIDER & SIMPSON

By _____
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Attorneys for Plaintiff
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Detroit, MI 48226
(313) 961-7363

DATED: April 1, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK,

Plaintiff,

-v- No. 86 CV71763 DT

CHRYSLER CORPORATION, HON. JULIAN ABELE COOK, JR.

Defendant.

AFFIDAVIT OF STANLEY SMOLAREK
IN SUPPORT OF MOTION TO REMAND

STATE OF MICHIGAN)
:SS
COUNTY OF WAYNE)

STANLEY SMOLAREK, Plaintiff in this action, deposes and says that:

1. I first became employed with Chrysler Corporation in 1953.

2. I remained an employee of Chrysler until my lay-off on or about October 8, 1984.

3. In 1955, while in the course of my employment at Chrysler, I suffered an accident which has left me with a post-traumatic seizure disorder.

4. This seizure disorder is controllable with medication which I have taken since 1955.

5. On October 8, 1984, I suffered a seizure at work.

6. Within about two weeks after suffering that seizure, the

medical department at Chrysler examined me and renewed the medical restrictions that I had had since my 1955 injury.

7. My medical condition and the medical restrictions that I had were unrelated to my ability to perform the maintenance-type work that I performed in 1984.

8. After my examination at the medical department, I reported to my general foreman for the purpose of returning to work.

9. At that time, I was told that there was no work available within my medical restrictions, even though I had reason to believe that my former job was still available.

10. In 1985, I reported back to the plant and had a further discussion with my general foreman in an effort to return to work.

11. At that time, the general foreman explained his reason for not returning me to work as follows: "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

12. It is my information and belief that the general foreman had the authority to return me to work to my former position if he was so inclined.

13. It is my information and belief that my former job has remained available since October 8, 1984.

14. It is my belief that the general foreman did not return me to work at my former job because of unfounded perceptions on

his part concerning the ability to work of persons with seizure disorders.

Stanley A Smolarek
STANLEY SMOLAREK

Subscribed and sworn to before me
this 3rd day of September, 1986.

Kimberly K Coalson
NOTARY PUBLIC
Wayne County, MI
My Commission Expires: 2/12/90

KIMBERLY K. COALSON
Notary Public, Wayne County, Michigan
My Commission Expires February 12, 1990